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CITATIONS

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-194

SARAH SCHEUER, Administratrix
of the Estate of Sandra Lee Scheuer, Deceased,
Petitioner,

vs.

JAMES RHODES, Governor
of the State of Ohio,
SYLVESTER DEL CORSO, Adjutant General
of the Ohio National Guard,
ROBERT CANTERBURY, Assistant Adjutant General
of the Ohio National Guard,
HARRY D. JONES, a Major
of the Ohio National Guard
JOHN E. MARTIN and RAYMOND J. SRP,
Captains of the Ohio National Guard,
VARIOUS OFFICERS and ENLISTED MEN,
members of G Company, 107th Armored Cavalry
Regiment and A Company, First Battalion,
145th Infantry Regiment of the
Ohio National Guard, and
ROBERT WHITE, President,
Kent State University,
Respondents.

BRIEF OF DEFENDANT-RESPONDENT JAMES A. RHODES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OTHER RESPONDENTS ADOPTED

Counsel for Respondent James A. Rhodes (in his individual capacity), which Respondent was Governor of Ohio at the commencement of this action, adopts and incorporates herein the Brief in Opposition to the Petition filed in this Court by Charles E. Brown, Counsel of Record for the Respondents; Robert F. Howarth, Jr. and William W. Johnston of Crabbe, Newlon, Potts, Schmidt, Brown and Jones, Counsel for the Respondents.

In supplement to the statements and arguments therein set forth in behalf of such of the named Respondents as were served with process, Respondent James A. Rhodes (hereinafter referred to as Respondent Rhodes) presents additional grounds why Petitioner's cause should not be reviewed by this Court.

QUESTIONS PRESENTED

1. Whether an action brought in a United States District Court under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.

2. Whether there is a doctrine of unqualified executive immunity which immunizes state officials from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, against the Governor of Ohio, Adjutant

General of the Ohio National Guard, officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the outright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

4. Whether Federal Courts have jurisdiction to review a Governor's determination, pursuant to his State's Constitution and laws, that it is necessary to order units of the National Guard into service to assist civil authorities in putting down civil disorders.

5. Whether officers and enlisted men of the Ohio National Guard, upon being ordered to duty by the Governor to suppress riots, can in any circumstance be deemed agents of the Governor rather than agents of the State of Ohio and the United States.

6. Whether injury caused by an act or omission of a member of the Ohio National Guard can be imputed to the Governor, rather than to an intervening cause, where it is not shown that such act or omission was embraced within orders issued by the Governor in calling units of the National Guard to active duty.

REASONS FOR DENYING THE WRIT

1. The Eleventh Amendment

Aware that nothing so catches the attention of this Court as a bald assertion that the Court below has ruled directly in conflict with controlling decisions of this Court, the Petitioner asserted that the Court of Appeals failed to follow the principle "firmly established in *Ex Parte Young*, 209 U.S. (1908) . . ." that a State official

who engages in conduct in violation of the United States Constitution loses any shield of immunity otherwise possessed by the State."

Ex Parte Young lays down a far narrower principle, one that the Court of Appeals correctly found to be "inapposite". What *Ex Parte Young* stands for is that "* * * individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." *Ex Parte Young*, 209 U.S. at 155.

As Chief Judge Weick observed in the Court of Appeals' opinion herein, "*Ex Parte Young* * * * was an action for injunction * * *. Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the State's chief executive of his highest duty to suppress riots or insurrections and protect the public." (Appendix to Petition for Certiorari, page 12a.) Moreover, Governor Rhodes' calling out the National Guard on April 29, 1970, constituted a completed exercise of office, and thus a completed act of the State, not a threatened action "under color of law."

Reasons why *Ex Parte Young* is not controlling herein are further elaborated in the Brief in Opposition filed by Charles E. Brown, Robert F. Howarth, Jr. and William W. Johnston for the Respondents.

Petitioner's quotation (at page 11 of her Petition) from Justice Reed's Opinion for a unanimous Court denying certiorari in *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944) is irrelevant and misleading. There the action was held to be against the State and not maintainable because the State had not con-

sented to be sued in Federal Court. The same irrelevancy characterizes the reference to *Great Northern Insurance Co. v. Read*, 322 U.S. 47 (1944), referred to at page 12 of the Petition.

2. Executive Immunity

Counsel for Respondent Rhodes leaves to the *Briefs in Opposition* filed in behalf of all Respondents, argument as to the full thrust and scope of executive immunity. For the purposes of this Brief, it should suffice to point out that this Court has unhesitatingly given the protection of executive immunity to a Governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders directed toward that end. Even Judge Celebrezze, in his dissent below, conceded:

> "The Supreme Court has consistently ruled that the executive decision to call up the militia is conclusive, and in and of itself is not subject to judicial review."
>
> (Petition for Certiorari, page 69a.)

What Judge Celebrezze concedes can fairly be construed to be the import of *Moyer v. Peabody*, 212 U.S. 78 (1909), which, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former Governor (of Colorado) for a trespass against the Plaintiff. The complaint was dismissed on demurrer. Certiorari was denied, and the Court, speaking by Justice Holmes, said in part:

> "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a State law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication [the imprisonment ordered in this case]."
>
> *Moyer v. Peabody*, 212 U.S. 78 at page 85.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this Court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved *Moyer v. Peabody*, *supra*, in these words (Chief Justice Hughes, at page 399):

> "By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace, from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402.)

In the District Court, Petitioner herein sought to insulate her complaint from dismissal for want of jurisdiction by extravagant conclusionary allegations that Respondent Rhodes "recklessly wilfully, and wantonly," and outside the scope of his office,

> "—ordered the Ohio National Guard to duty on the Kent State University's main campus;
> "—ordered members of the Ohio National Guard to break up all assemblies without regard to their lawfulness; and
> "—engaged in misconduct and caused Plaintiff's decedent to be shot and killed."

Such accusations were "reckless, wilful and wanton" on the part of the pleader. They were instantly negated by facts of which the District Court took judicial notice, triggered by the incorporation into the Motion to Dismiss of Respondent Rhodes' Proclamations as Governor

on April 29 and May 5, 1970, reciting the necessities that gave rise to the use of National Guard troops in aid of the civil authorities. (Petition for Certiorari, page 23a and 25a) Senior Circuit Judge O'Sullivan's impatience in his concurring opinion, with such extravagantly conclusionary pleading has been interpreted by Petitioner's Counsel with curious distortion, as indicating "a purpose to cripple the Civil Rights Act". (Petition, page 13, note 12.)

3. Application of Rule 8, Federal Rules of Civil Procedure

Petitioner's question No. 3 asks simply whether the United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a Motion to Dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

The answer, of course, is in some instances "Yes"; but in the Complaint of Petitioner Scheuer against Respondent Rhodes in the United States District Court for the Northern District of Ohio, the answer is "No".

Rule 8 covers many things, but our prime concern is with Rule 8(d), which provides in its first sentence:

> "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

Rule 7(a) tells us that a Complaint requires a responsive pleading, but Rule 12(b) authorizes the defense that the Court lacks jurisdiction over the subject matter to be presented by motion.

After defining a "speaking motion" as one that to be sustained, requires reference to facts not appearing on

the use of the pleading attacked, *Moore's Federal Practice* in its treatment of Rule 12(b) of Federal Rules of Civil Procedure (Volume 2A, page 2265), states flatly that a majority of decisions under Rule 12(b) approves the use of a speaking motion to state the defense of lack of jurisdiction over the subject matter of the action. Such defense was contained in the first branch of the separate Motion to Dismiss filed in the District Court by Respondent Rhodes, and it was also the basis of the Motion to Dismiss filed by all Respondents.

Both Motions to Dismiss "spoke" in two ways: (1) by incorporating the texts of the two Proclamations issued by Respondent Rhodes as Governor on April 29 and May 5, 1970, ordering into active service units and personnel of the National Guard, and (2) having thus placed the Proclamations before the Court, facilitated the Court's taking judicial notice of matters of public record and common knowledge with respect to events on the Kent State Campus April 29 through May 4, 1970.

4. Reviewability by Federal Courts of a Governor's Determination of Need to Call Out Units of the National Guard

A long line of Federal cases has for years yielded to the Executive the decision of political questions. Typical of the cases were *Cherokee Nation v. Georgia*, 5 Pet. 1; *Marbury v. Madison*, 1 Cranch 137; and *Coleman v. Miller*, 307 U.S. 433. Then came Justice Brennan's Opinion in *Baker v. Carr*, 369 U.S. 186 (1962) that seemed to exclude for the future the argument that a case like the instant one against Respondent Rhodes should be treated as non-justiciable on the ground that a decision to call out the National Guard is "political". The Brief in Opposition filed herein by Charles E. Brown,

Robert F. Howarth, Jr. and William W. Johnston, in behalf of all Respondents, logically establishes that Respondent Rhodes' decision as Governor to dispatch Ohio National Guard units to the Main Campus of Kent State University on April 29, 1970, as a "political decision" sanctioned by the Constitution of the United States and not affected by the *Baker v. Carr* ban.

Stated succinctly, Article I, Section 8, Clause 16 of the U.S. Constitution empowers Congress to "provide for organizing, arming and disciplining the Militia, * * * reserving to the States, respectively, the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress." Congress has so provided in Title 32, United States Code, and has stated that:

> "—a state that does not comply with Title 32 shall lose its National Guard money" (Section 108);
>
> "The President shall be the source of regulations and orders to organize, discipline, and govern the National Guard" (Section 110);
>
> "—the discipline, including training, of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force" (Section 501);
>
> "—the Army and Air National Guard shall use Army and Air Force type uniforms, respectively" (Section 701).

It is, therefore, clear that Respondent Rhodes' calling out the National Guard was in a context containing the indicia of a political question as defined by Justice Brennan: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * *" *Baker v. Carr*, 369

U.S. 186 at 217 (1962). In this instance, the "coordinate political department" is the Executive, i.e., the Presidency.

5. National Guardsmen as Agents of the State

By force of Article III, Section 10 of the Constitution of the State of Ohio, the Governor is "Commander-in-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States". Chapter 5919 of the Ohio Revised Code states the composition of and provides for the organization, discipline and training of the Ohio National Guard. That chapter is interwoven with requirements set forth in Title 32, United States Code, and in Regulations issued by the President. Section 5919.10, Ohio Revised Code, specifies the form of contract with the State of Ohio and the United States that each man enlisting in the Ohio National Guard must sign. The text of that section, continuously in force since September 9, 1957, reads as follows:

> "5919.10. All men enlisting in the Ohio national guard shall sign an enlistment contract and subscribe to the following oath of enlistment: 'I do hereby acknowledge to have voluntarily enlisted this ___ day of _____, 19___, as a soldier in the national guard of the United States and of the state of Ohio, for a period of _____ year___, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the state of Ohio, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the president of the United States and of the governor of the state of Ohio, and of the officers appointed over me according

to law and the regulations and uniform code of military justice. This section shall not apply to personnel transferred or assigned to the Ohio national guard under the laws and regulations of the United States."

From the foregoing, it is obvious as a legal matter that any enlisted man in the Ohio National Guard at times relevant to this action was by contract an agent of the State of Ohio and of the United States, and was not an agent of Respondent Rhodes individually.

Similarly, officers in the Ohio National Guard are agents of the State of Ohio and of the United States by force of Article I, Sec. 8, Clause 16, of the United States Constitution, heretofore quoted at page 9. Implementing the United States constitutional provision are Sections 5919.02, 5919.05, 5919.06 and 5919.071 of the Ohio Revised Code. Section 5919.05, containing the officer's Oath of Office, makes the Principal-Agent relationship clear.

6. Intervening Cause

The orders issued by Respondent Rhodes in his official capacity as Governor and Commander-in-Chief were those placing units of the Ohio National Guard on active duty as reflected in his Proclamations of April 29 and May 5, 1970. Those orders did not specify which units were to be called up, whether the officers and men in them were to carry guns loaded with live ammunition or not, or whether they were to break up assemblies. It thus cannot be argued that Governor Rhodes issued orders in excess of his powers as Governor and that such excess is imputable to Respondent Rhodes as an individual. There was no excess in the orders reflected in the Proclamation.

It is not conceded that any act of Respondent Rhodes was negligent, willful, wanton, reckless or otherwise culpable. Any allegation to the contrary is a conclusion of the Petitioner. But even if it were conceded that he was negligent or even reckless in ordering the National Guard to the Main Campus of Kent State University, it could not rationally be further concluded that such order was the proximate cause of any damage to persons present on the Campus, when such damage was patently caused by an intelligent, independent, intervening act of another or others.

CONCLUSION

Petitioner's case presents no Federal question of substance for review by this Court. Therefore, the writ prayed for should be denied.

Respectfully submitted,

R. BROOKE ALLOWAY,
Counsel of Record for
Respondent James A. Rhodes.

AFFIDAVIT OF SERVICE

State of Ohio
County of Franklin } ss

I, R. Brooke Alloway, Senior Partner in the firm of Tenner, Alloway, Goodman, DeLeone and Duffey, Counsel of Record for Respondent James A. Rhodes, herein, hereby certify that on this 24th day of January, 1973, I served three copies of the foregoing Brief of Defendant-Respondent James A. Rhodes in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on Michael E. Geltner, American Civil Liberties Union of Ohio Foundation, Inc., 203

East Broad Street, Columbus, Ohio, 43215, Counsel for the Petitioner; Melvin L. Wulf, Sanford Jay Rosen, Joel M. Gora, American Civil Liberties Union of Ohio Foundation, Inc., 22 East 40th Street, New York, New York, 10016; Nelson G. Karl, 33 Public Square, Cleveland, Ohio, 44113, and Walter S. Haffner, 1008 Standard Building, Cleveland, Ohio, 44113, additional attorneys for Petitioner, no Counsel of Record having been designated; Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp, 42 East Gay Street, Columbus, Ohio, 43215; C. D. Lambrose, Esq., 750 Prospect Avenue, Cleveland, Ohio, 44115, Attorney for Raymond J. Srp; and Delmar Christensen, Esq., Attorney for Harry D. Jones and John E. Martin, Respondents herein, by depositing the same in a United States mailbox, first class postage prepaid, addressed to each of the attorneys above at his designated address, being the only parties hereto required to be served.

R. Brooke Alloway,
Counsel of Record for
Respondent James A. Rhodes.

Subscribed and swon to before me this 24th day of January, 1973.

JOHN M. McELROY, Attorney At Law
Notary Public—State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-914

SARAH SCHEUER, Administratrix of the Estate of Sandra Lee Scheuer, Deceased,
Petitioner,
v.
JAMES RHODES, Governor of the State of Ohio, SYLVESTER DEL CORSO, Adjutant General of the Ohio National Guard, ROBERT CANTERBURY, Assistant Adjutant General of the Ohio National Guard, HARRY D. JONES, a Major of the Ohio National Guard, JOHN E. MARTIN, and RAYMOND J. SRP, Captains of the Ohio National Guard, and ROBERT WHITE, President, Kent State University,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, AND WHITE IN OPPOSITION

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Respondents.

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, AND WHITE IN OPPOSITION

QUESTIONS PRESENTED

1. Respondents are satisfied with petitioner's first question presented for review (Pet. 3).[1]

2. Respondents are not satisfied with petitioner's second question (Pet. 3) in that the question is predicated upon a legal conclusion never drawn by the court below. The following two questions are more properly brought to this Court for review:

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[1]For purposes of this brief in opposition, "Pet." together with Arabic numerals refers to pages of petitioner's petition for a writ of certiorari filed herein; "A." together with Arabic numerals refers to pages of petitioner's appendix appended to her petition for a writ of certiorari filed herein.